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BLENDED SENTENCING IN MONTANA: A NEW WAY TO LOOK AT AN OLD PROBLEM

Robert E. Henderson*

I. INTRODUCTION

"40-year sentence for 15-year-old who killed father."[1]

"Additional charges filed in alleged gang murder."[2]

"Flathead county attorney wants teen tried as adult."[3]

The general perception is that juveniles are committing more violent offenses and with greater frequency. Fueled by the media, many believe that today's juvenile offenders are a new breed of "super-predators."[4] Yet the juvenile crime rate has continued to drop since its all time high in 1993.[5] Because of

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1. Michael Jamison, *40-year Sentence for 15-year-old who Killed Father*, MISSOULIAN, August 5, 2000, at B1.

2. John Stromnes, *Additional Charges Filed in Alleged Gang Murder*, MISSOULIAN, March 18, 1999, at A1.

3. Ron Nash, *Flathead County Attorney wants Teen Tried as Adult for Drowning*, MISSOULIAN, August 19, 1999, at B2.

4. *See* SHAY BILCHIK, U.S. DEP'T OF JUSTICE, CHALLENGING THE MYTHS: 1999 NATIONAL REPORTS SERIES 1 (2000). The author explains that the term "super-predator" was created by some researchers because of the increasing juvenile crime rate in the late 1980s and the expected increase of the juvenile population through-out the 1990s. Yet as shown by the juvenile violent crime arrest rate, the average juvenile offender is far from a "super-predator." *See id*; *see also* HOWARD SNYDER, U.S. DEP'T OF JUSTICE, JUVENILE ARRESTS 1997 1 (1998) (visited Sept. 22, 1999) <http://ojjdp.ncjrs.org/ojstatbb/qa007 .html.> (stating the overall juvenile arrest rate reached an all time high in 1996, before declining in 1997).

5. *See* HOWARD SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT at 62-63, 88 (1999) ("Serious violence victimizations in the U.S. peaked in 1993 at 4.2 million, the highest level since the NCVS began in 1973. . . . Between 1993 and 1997, the number of serious violent victimizations with at least one juvenile offender dropped 33% from 1,230,000 to 830,000."); *see also* Kim Brooks et al., *School House Hype: Two Years Later* (visited Apr. 15, 2000) <http://www.cjcj.org/schoolhousehype/ shh2.html.>; *see also* BILCHIK, *supra* note 4 at 2. The author clarifies that although the juvenile violent crime rate reached an all time high in 1994, it has been steadily decreasing since and in 1997 was at a level near that of

this inaccurate perception, there is a desire to "get tough" on juvenile offenders.[6] During the 1990's almost all states amended their juvenile code to impose greater punishments on juveniles who commit "adult crime."[7] Montana was no exception.

Montana has amended its juvenile code over the past two decades to address the increasing seriousness of offenses committed by its youth. In the late 1980's, the state legislature amended the juvenile code to allow for easier prosecution of older teens charged with deliberate homicide in order to protect society.[8] In 1997, the legislature revised the transfer statutes[9] in response to the fear of gang-related crime and passed the Montana Street Terrorism Enforcement and Prevention Act.[10]

1989. *See id.*

6. *See* SNYDER & SICKMUND, *supra* note 5 at 87-88. The authors point out that throughout the 1980's and 1990's the public perceived juvenile crime as a serious problem and the juvenile justice system as being too lenient with offenders. States responded by passing more punitive laws, focusing on exclusion from juvenile jurisdiction, transfer to adult court, and mandatory minimum sentences. More and more states are treating juvenile offenders as adult criminals. *See id.*

7. *See* SNYDER & SICKMUND, *supra* note 5 at 89. According to the Department of Justice, the national trend has been to expand juvenile transfer laws, thereby limiting the juvenile court's jurisdiction over serious offenses committed by juveniles. Between 1992 and 1997, all but three states amended thier juvenile code in one of three areas: (1) Transfer provisions – 45 states have increased the availability of transfer to adult court for juveniles who commit serious offenses; (2) Sentencing authority – 31 states have expanded the number of options juvenile court judges have in determining a juvenile's disposition; (3) Confidentiality – 47 states have passed new laws which remove traditional juvenile court confidentiality from juvenile proceedings. Only Nebraska, New York, and Vermont have not amended their juvenile code in one of the three areas. *See id.*

8. *See* H. 470, 50th Reg. Sess. (Mont. 1987). Then Attorney General, Marc Racicot, a proponent of the amendment for easier prosecution, stated "at least [twenty] homicides have been committed by teenagers within the last [eighteen] to [thirty-six] months. . . . This is a very important piece of legislation that will allow authorities a fighting chance . . . ."; *see also In re* Wood, 236 Mont.118, 127, 768 P.2d 1370, 1376 (1989) ("[T]he classification found in § 41-5-206, MCA, based on age and seriousness of the offense, is rationally related to the legitimate state objective of curbing homicides committed by teenagers and protecting society from these violent offenders under both the United States and Montana Constitutions.").

9 Every state has some statutory device of prosecuting juveniles who fall within the juvenile system as adults. *See* MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, HOW JUVENILES GET TO CRIMINAL COURT 1 (1994); *See generally* discussion *infra* Part II.B.

10. *See* S. 285, 55th Reg. Sess. (Mont. 1997). The preamble to the Montana Street Terrorism Enforcement and Prevention Act stated:

> "WHEREAS, the Legislature further finds that the State of Montana is in a situation of rising crisis caused by the entry into the state of criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods; and

The Act focused on retribution, deterrence, and punishment for gang-related offenses, rather than rehabilitation.

In 1995, the Montana Legislature took a different approach. Instead of sending more children to adult court, the Legislature modernized the juvenile code to provide an alternative option to youth court judges when dealing with delinquent youths – a concept known as blended sentencing.[11] This alternative, the Extended Jurisdiction Prosecution Act (hereinafter "EJPA"), allows a youth court judge to impose both a traditional juvenile disposition and an adult sentence. Under the EJPA, the youth remains under the protection of the youth court, thereby retaining all the protections and benefits accorded to juveniles, yet receives the possibility of an adult sentence.[12]

In 1997, the Montana Supreme Court addressed the constitutionality of the EJPA in the case of *In the Matter of S.L.M.*[13] (hereinafter "*S.L.M.*"). The Court concluded that the EJPA violated both the Equal Protection Clause[14] and the Right of Minors Clause[15] of the Montana Constitution because of the possibility that a juvenile might receive a greater sentence than an adult would receive for committing the same offense.[16] In response to this ruling, the Montana Legislature passed a substantially similar version of the EJPA in 1999, adding language that limited the length of an Extended Jurisdiction

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WHEREAS, these activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected; and

WHEREAS, the Legislature wishes to deter the growing influx of violent criminal street gangs and criminal street gang-related activity in its communities and to protect Montana citizens from the terror associated with violent criminal street gangs."

See id. at Preamble.

11. *See* H. 380, 54th Reg. Sess. (Mont. 1995) (codified at MONT. CODE ANN. §§ 41-5-1101 to -1105 (1995)).

12. The United States Supreme Court has held that juveniles must be afforded many of the same Due Process protections that adults have. *See* In re Gault, 387 U.S. 1 (1967) (holding juveniles must be given notice of charges, the right to counsel, the right to confront and cross-examine witnesses, and the right to appellate review in adjudicatory proceedings.); *see also* In re Winship, 397 U.S. 358 (1970) (requiring that the level of proof in juvenile adjudicatory proceedings is beyond a reasonable doubt); Breed v. Jones, 421 U.S. 519 (1975) (holding juveniles are protected under the Double Jeopardy Clause of the Fifth Amendment).

13. 287 Mont. 23, 951 P.2d 1365 (1997).

14. *See* S.L.M., 287 Mont. at 26, 951 P.2d at 1367.

15. *See id.*

16. *See id.*

Juvenile disposition.[17] In addition to amending the EJPA, the 1999 Legislature also amended the preamble and the Declaration of Purpose of the Montana Youth Court Act.[18]

The 1999 amendments specifically addressed the deficiencies found by the Montana Supreme Court in *S.L.M.* This comment will address the constitutionality of the 1999 version of the EJPA and, more broadly, the 1999 Amendments to the Montana Youth Court Act.[19] Part II briefly describes the evolution of the Juvenile Court System. Part III demonstrates how the EJPA is an alternative to the traditional juvenile justice process. Part IV and V chronicles the tenuous relationship between the Montana Legislature and the Montana Supreme Court as seen by the Court's holding in *S.L.M.* and the Legislature's response to the decision. Part VI and VII describe how the 1999 Amendments alleviate the Equal Protection and Right to Minors deficiencies found in the EJPA. This comment concludes that blended sentencing statutes, specifically Montana's Extended Juvenile Jurisdiction statute, are appropriate alternatives in addressing the problems associated with juvenile offenders. Blended sentencing offers peace of mind to citizens without losing sight of the fact that most delinquency problems can be adequately addressed within the juvenile system.

II. OVERVIEW OF THE JUVENILE JUSTICE SYSTEM

A. Juvenile Court Movement

In 1899, the Illinois Juvenile Court Act created the first juvenile court.[20] Prior to this act, juveniles were treated as

17. *See* S. 243, 56th Reg. Sess. (Mont. 1999). The 1999 Amendments added the phrase "the combined period of time of a juvenile disposition . . . plus an adult sentence . . . may not exceed the maximum period of imprisonment that could be imposed on an adult." *See generally* discussion *infra* Part IV.

18. *See* MONT. CODE ANN. § 41-5-102(2) (1999). The goals of the Montana Youth Court Act were amended to read: "[T]o prevent and reduce youth delinquency through *a system that does not seek retribution* but that provides: immediate, consistent, enforceable, and avoidable consequences of youths' actions; a program of supervision, care, rehabilitation, detention, competency development, community protection for the youth before they become adult offenders; and, in appropriate cases, restitution as ordered by the youth court." *See id.* (emphasis added).

19. *See generally* discussion *infra* Part V.

20. *See* JOHN C. WATKINS, JR., THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS 43-73 (1998).

adults, being incarcerated with adults when convicted.[21] The new juvenile court introduced a special court for delinquent youths, separate from adult proceedings.[22] Following the lead of Illinois, several state legislatures quickly passed legislation that implemented juvenile courts.[23] The idea behind juvenile courts was to concentrate on the rehabilitative possibilities that existed in minors, emphasizing an informal court structure.[24] Under this model, juveniles were not viewed as criminals, but as troubled youths in need of supervision. Because of this "child-saving"[25] belief, most did not see the need to impose constitutional protections upon the juvenile court.

During the 1950's and 1960's, scholars began to question the means by which juveniles were treated.[26] Although the philosophy of juvenile courts was still seen as benevolent, the amount of arbitrariness that existed within the court raised several constitutional questions.[27] Beginning in 1967, the United States Supreme Court began providing juveniles with constitutional due process protections.[28] *In re Gault,*[29] the seminal juvenile law case, involved a young boy who was arrested for making crank phone calls to his neighbor.[30] Neither

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21. *See* Kenneth A. Schatz, *Juvenile Justice: Reflections on 100 Years of Juvenile Court*, VT. B.J. & L. DIG. at 50 (Dec. 1998).

22. *See id.*

23. *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 1, 139 (1977) ("The Illinois act was considered a prototype for legislation in other states and juvenile courts were quickly established in Wisconsin (1901), New York (1901), Ohio (1902), Maryland (1902), and Colorado (1903)."); *see generally* HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 23-25 (1927).

24. *See generally* LOU, *supra* note 23.

25. PLATT, *supra* note 23 at 3 ("The term 'child savers' is used to characterize a group of 'disinterested' reformers who regarded their cause as a matter of conscience and morality, serving no particular class or political interests.").

26. Because the purpose of the juvenile court was to protect the child, due process protections afforded to criminal defendants was deemed unnecessary. However, this could and often did lead to great disparities between dispositions between juveniles accused of the same offense. *See* In re Gault, 387 U.S. 1 (1967); *see also* Schatz, *supra* note 21 at 50.

27. For example, Justice Fortas, author of *United States v. Kent*, 383 U.S. 541 (1966) understood that the juvenile court was "rooted in [a] social welfare philosophy" and not in determining criminal responsibility. *See id.* at 554. However, Justice Fortas disagreed that the objectives of the juvenile court – guidance and rehabilitation – were sufficient reasons to invite "procedural arbitrariness" into the United States Constitution when dealing with juveniles. *See id*; *see also* Gault,307 U.S. at 28 (Justice Fortas stating "Under our Constitution the condition of being a boy does not justify a kangaroo court.").

28. *See* In re Gault, 387 U.S. 1 (1967).

29. 387 U.S. 1 (1967).

30. *See id.* at 4.

the boy nor his parents received notice of the charges, assistance of counsel, or an opportunity to cross-examine witnesses.[31] After being adjudicated a delinquent youth, the judge ordered the young boy to be committed to the Arizona Industrial School at Fort Grant for an indeterminate period not to exceed six years.[32] The maximum penalty for an adult convicted of the same offense was two months in jail or a fifty dollar fine.[33] Because of this inequality between youths and adults, the United States Supreme Court held that juveniles were entitled to adequate notice of charges, the assistance of counsel, the privilege from self-incrimination, and the right to confront witnesses during delinquency proceedings.[34]

Following *Gault*, the United States Supreme Court handed down several cases affirming that juveniles should have the right to avail themselves to the United States Constitution.[35] Today, with a few exceptions,[36] most juveniles are afforded the same protections as adults when facing criminal charges.[37]

B. Transfer Laws

Almost everyone agrees that not all juveniles should be treated within the juvenile justice system. All states have some mechanism that allows the transfer of juveniles from youth court to the adult court.[38] Waiving jurisdiction by a juvenile court relinquishes the juvenile court's jurisdiction over a child and permits the juvenile offender to be criminally prosecuted as an adult.[39] The policy behind most juvenile transfer statutes is

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31. *See id.* at 5-6.

32. *See id.* at 7-8.

33. *See* CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 86 (1998).

34. *See generally* In re Gault, 387 U.S. 1 (1967).

35. *See, e.g.,* In Re Winship, 397 U.S. 358, 368 (1970) (holding that the required standard of proof in delinquency proceedings is beyond a reasonable doubt); *see also* Breed v. Jones, 421 U.S. 519, 541 (1975) (holding that the Double Jeopardy Clause of the United States Constitution applies to juvenile proceedings).

36. *See, e.g.,* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that juveniles do not have a constitutional right to jury trials in delinquency proceedings); Schall v. Martin, 467 U.S. 253, 256-57 (1984) (holding that juveniles may be subjected to "preventative detention" while awaiting trial).

37. *See* SNYDER & SICKMUND *supra* note 5 at 87-88.

38. *See* MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, HOW JUVENILES GET TO CRIMINAL COURT 1 (1994); *see also* CHARLES M. PUZZANCHERA, U.S. DEP'T OF JUSTICE, DELINQUENCY CASES WAIVED TO CRIMINAL COURT 1 (2000).

39. *See* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 4-1 (1997).

that serious delinquent behavior needs to be punished more severely, such as the possibility of longer incarceration, then what is normally available within the juvenile justice system.[40]

Transfer statutes fall into one of three categories: judicial waiver, prosecutorial waiver, or statutory exclusion.[41] Judicial waiver statutes give the youth court judge the discretion to transfer juveniles to adult court.[42] The decision to transfer is usually based on the age of the offender, the seriousness of the alleged offense, and the juvenile's past criminal behavior.[43] Prosecutorial discretion statutes vest the prosecutor with the authority to file charges in juvenile court or adult court.[44] These types of statutes are also known as "concurrent jurisdiction" statutes.[45] Lastly, statutory exclusion statutes exclude juveniles charged with certain enumerated felonies from juvenile court jurisdiction.[46]

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40. *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 80 (1997) ("Although legislatures and courts transfer youths to criminal court so that they may receive longer sentences as adults . . . chronic property offenders constitute the bulk of juveniles judicially waived in most states . . . .").

41. According to the Office of Juvenile Justice and Delinquency Prevention, "[a]ll states allow juveniles to be tried as adults in criminal courts under certain circumstances. A juvenile's case can be transferred to criminal court for trial in one of three ways . . ." *See* SICKMUND, *supra* note 38 at 1.

42. *See id.; See, e.g.*, ALASKA STAT. § 47.12.100 (Michie 1999) ("If the court finds at a hearing on a petition that there is probable cause for believing that a minor is delinquent and finds that the minor is not amenable to treatment under this chapter, it shall order the case closed. After a case is closed under this subsection, the minor may be prosecuted as an adult").

43. *See* SICKMUND, *supra* note 38 at 3.

44. *See* SICKMUND, *supra* note 38 at 1. *See, e.g.*, ARIZ. REV. STAT. § 13-501(B), which states:

> "The county attorney may bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is at least fourteen years of age and is accused of any of the following offenses:
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> 1. A class 1 felony;
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> 2. A class 2 felony,
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> 3. A class 3 felony in violation of an offense in chapters 10 through 17,
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> 4. A class 3, 4, 5, or 6 felony involving the intentional or knowing infliction of serious physical injury or the discharge, use of threatening exhibition of a deadly weapon or dangerous instrument;
>
> 5. Any felony offense committed by a chronic felony offender; or
>
> 6. Any offense that is properly joined to an offense list in this subsection."

45. *See* SICKMUND, *supra* note 38 at 1-3; *see also* PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996-97 UPDATE at 1, 3 (Nov. 1998).

46. *See* SICKMUND, *supra* note 38 at 1-3; *see, e.g.*, OR. REV. STAT. § 137.707(1)(a) (1998) ("when a person is charged with aggravated murder, . . . or an [enumerated] offense [and]. . . is 15, 16, or 17 years of age at the time the offense is committed, . . . the

Over the past decade, the number of juveniles transferred to adult court has almost doubled.[47] The increased availability of transfer was a result of the "get tough on juvenile crime" policy by state legislators.[48] Yet, the increasing use of transfer statutes to address juvenile delinquency is contradictory to the underlying philosophy that youthful offenders are amendable through rehabilitation.[49] Transferring large amounts of youths to criminal court fails to achieve the goals of the juvenile justice system and creates substantial and unforeseen consequences in the process.[50]

Criminal theorists agree that for criminal sanctions to be effective, the sanction must be swift, severe, and certain.[51] Research indicates that the juvenile system is more swift when imposing sanctions for delinquent behavior then adult court.[52] Further, most children who are transferred to adult court are treated less harshly and serve less time than they would have served in the juvenile system.[53] In other words, "[j]uvenile courts are more likely to impose immediate sanctions than adult courts, and thus can have a more profound effect on juvenile offenders."[54]

One serious unforeseen consequence of transferring youth to

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person shall be prosecuted as an adult in criminal court").

47. *See* SNYDER & SICKMUND, *supra* note 5 at 170. The authors point out that between 1996 and 1997, the number of delinquency cases judicially waived to criminal court grew 47%.This percentage is somewhat deceiving, due to more juveniles being charged directly in adult court and bypassing the juvenile system completely. The actual increase of juveniles being processed in adult court may be somewhat closer to 73%. *See id.*

48. *See* TORBET & SZYMANSKI, *supra* note 45 at 1; *see also* SNYDER & SICKMUND, *supra* note 5 at 88; *See* Donna M. Bishop et al., *The Transfer to Juveniles of Criminal Court: Does it Make a Difference?*, 42 Crime and Delinquency 171, 172 (Apr. 1996).

49. Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 401 (1998).

50. *See id.*

51. *See* A. Javier Trevino, THE SOCIOLOGY OF THE LAW 18-20 (1996) (citing CESARE BONESANA, AN ESSAY ON CRIME AND PUNISHMENT (1794)).

52. *See* Klein, *supra* note 49 at 402.

53. *See* SNYDER & SICKMUND, *supra* note 5 at 176; *see also* Klein, *supra* note 49 at 402. *But cf.* Jeffrey Fagan, *Juvenile Justice Policy and Law: Applying Recent Social Science Findings to Policy and Legislative Advocacy, in* CRIMINAL LAW AND URBAN PROBLEMS 1999, at 395, 406 (PLI Litig. and Admin. Practice Course Handbook Series No. C0-000U, 1999) ("[A]dolescents convicted in the criminal court were more likely to be incarcerated . . . than youths adjudicated in the juvenile court. While incarceration is more likely for youths tried as adults, the length of punishment is no different on either side of the jurisdictional divide.").

54. *See* Klein, *supra* note 49 at 402.

criminal court is the likelihood of increased recidivism.[55] Scholars argue that transferring a child to criminal court is more detrimental to both the youth and society because the child is more likely to re-offend once released than if the child would have been treated within the juvenile system.[56]

It is not a surprise that recidivism increases with transfer. When a juvenile is transferred to criminal court the juvenile loses the ability to access specialized treatment programs which exist within the juvenile system.[57] Once transferred, many juveniles are incarcerated with adults.[58] In doing so, the chances of the juvenile being the victim of a violent or sexual assault is great, thereby creating a need for the youth to be violent and aggressive in order to protect him or herself.[59] The consequence of transfer, though not surprising, surely should make society question the desire to send more and more children to adult court receiving adult consequences.

Yet, as many problems exist within the transfer process,

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55. *See* Bishop, *supra* note 48 at 183. In a comparison study between transferred youth and non-transferred youth, juveniles who were not transferred to adult court were shown to have a lower recidivism rate. *See id.*; *See also* Marcy R. Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 CRIM. L. & CRIMINOLOGY 449, 492 (1996).

56. *See* Bishop, *supra* note 48 at 183 ("The transfer group recidivated at a higher rate than the non-transfer group. This was true of all seven classes of offense that resulted in [transfer]. Despite being incarcerated for longer periods of time, transferred youth nonetheless committed more offenses [when released]."); *see also Defusing the Myth: Prosecuting Children as Adults Doesn't Work to Decrease Juvenile Crime* (visited Apr. 22, 2000) <http://www.aclu.org/congress/kids/html>. "One study, comparing New York and New Jersey juvenile offenders, shows that the rearrest rate for children sentenced in juvenile court was twenty-nine percent lower than the rearrest rate for juveniles sentenced in the adult criminal court." *Id.* (citing Jeffery Fagan, *The Comparative Advantages of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders* 1, 21, 27 (1996) (unpublished manuscript on file with the American Civil Liberties Union.)).

57. For example, children in the juvenile system normally have an opportunity to get psychological and educational counseling, as well as job training which decrease the chances of re-offending later in life. *See* Klien, *supra* note 49 at 403.

58. *See id.* at 404-05 .

59. *See id* at 403 (citing Martin Frost et al., *Youth in Prison and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAMILY CT. J. 1, 9 (1989)) ("Studies show that sexual and physical assault of juveniles is much more likely in adult facilities. While 36.7% of juveniles in juvenile facilities report being victims of violent attack, 45.7% of juveniles in adult facilities report such abuse. In addition, sexual assault of a juvenile is five times more likely in an adult facility than in a juvenile one. Also, beatings by staff are nearly twice as likely for juveniles in adult facilities than for those housed in juvenile facilities, and attacks with weapons are nearly 50% more common [in adult facilities]. . . . [D]ue to the fear that most children feel in adult jails, the suicide rate for juveniles incarcerated in adult prisons and jails is eight times higher than for children in juvenile facilities.").

juveniles do not have a constitutional right to be treated within the juvenile court system.[60] Juveniles do not have the right *not* to be tried in adult court.[61] Juvenile courts are, by their very nature, created by legislative acts.[62]

The Montana Constitution mandates "one supreme court, district courts, justice courts, and such other courts as may be provided by law."[63] By creating youth courts designed specially to address the unique needs of juveniles, the legislature merely exercised its inherent legislative power. Accordingly, the legislature also has the inherent legislative power to redefine jurisdiction of youth courts without violating the constitutional rights of juveniles.

The end result in most situations however, is a decision to transfer based on vague beliefs about juvenile delinquency. Depending on the facts of each case, transfer of jurisdiction may not always be the most beneficial decision. Many cases involve an incident where transfer may be an option, but the unique situation of the youth may warrant youth court jurisdiction. In such cases, an intermediate alternative needs to be available. Because of this dilemma, blended sentencing has emerged as that intermediate alternative.

III. FRAMEWORK OF MONTANA'S BLENDED SENTENCING STATUTE

A. Blended Sentencing

The concept of blended sentencing is a hybrid solution to the problem of juvenile crime.[64] It normally provides more alternatives than traditional methods of juvenile sentencing.[65] It affords judges the ability to provide treatment to delinquent minors, but also provides the state with meaningful recourse if the minor chooses not to rehabilitate. One form of blended

60. *See* Klein, *supra* note 49 at 390.

61. *See id.*

62. *See In re* Wood, 236 Mont. 118, 122, 768 P.2d 1370, 1373 (1989) (noting that "several United States' Court of Appeals decisions have held that a state's treatment of youths outside of the criminal system is not an inherent right and may be redefined or restricted by state legislation, so long as no arbitrary or discriminatory classification is involved.") (citations omitted).

63. MONT. CONST. art. VII, § 1.

64. *See* Lisa Stansky, *More and More States Are Telling Teens: If You Do Adult Crime, You Serve Adult Time*, 82 A.B.A. J. 60, 64-5 (1996).

65. *See generally* PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME, RESEARCH REPORT, July 1996.

sentencing imposes both a juvenile disposition and an adult sentence. Other options include reverse waiver,[66] contiguous sentencing,[67] and criminal-inclusive sentencing.[68]

Extended jurisdiction juvenile statutes, like Montana's EJPA, attempt to combine the best of the juvenile justice system and the adult system, by imposing both an adult sentence and a juvenile disposition. By doing this, the rehabilitation goals of the juvenile system are retained, while still providing the State with adequate consequences needed to address chronic and serious delinquent behavior.

The first Extended Jurisdiction Juvenile statute was recommended by the Minnesota Task Force on the Juvenile Justice System ("Task Force") in 1992.[69] In response to rising juvenile crime, the Task Force was empowered to determine problems within the juvenile justice system and make recommendations accordingly. The Task Force turned to blended sentencing after determining that not all serious juvenile offenders should be transferred to adult court.[70]

One of the Task Force recommendations was "a graduated juvenile justice system" designed to create an intermediate category between the traditional juvenile disposition and adult

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66. Reverse waiver statutes are statutes that require minors who are convicted in adult court to serve their sentence under the juvenile court's jurisdiction. For example, MONT. CODE ANN. § 41-5-2503 (1999) states: "The district court, in sentencing a youth adjudicated in district court pursuant to 41-5-206, shall:

> (a) impose any sentence allowed by the statute that established the penalty for the offense of which the youth is convicted as if the youth were an adult and any conditions or restrictions allowed by statute; [or]
> (b) retain jurisdiction over the case until the criminally convicted youth reaches the age of 21 . . . ."

67. Contiguous sentence statutes are statutes that require juveniles to serve a portion of their sentence in a juvenile facility, completing the sentence in an adult facility once he or she reaches majority. *See, e.g.*, TEX. PENAL CODE ANN. § 61.079 ("[a]fter a child sentenced to [Youth Department of Corrections] becomes 16 years of age but before the child becomes 21 years of age, the commission may refer the child to the juvenile court that entered the order of commitment for approval of the child's transfer to the institutional division of the Texas Department of Criminal Justice . . . .").

68. When a minor is convicted of an offense in district court and receives both a juvenile disposition and a criminal sentence. This is similar to Montana's statute, but in Montana, the minor stays within the youth court's jurisdiction. *See, e.g.*, MO. REV. STAT. § 211.073 (1) (1998) (allowing dual jurisdiction of criminal and juvenile code stating, "the court may, in a case when an offender . . . has been transferred to a court of general jurisdiction, . . . invoke dual jurisdiction of both the criminal and juvenile codes . . . .").

69. *See* Kathryn A. Santelmann & Kari L. Lillesand, *Extended Jurisdiction Juveniles in Minnesota: A Prosecutor's Perspective*, 25 WM. MITCHELL L. REV. 1303, 1304 (1999).

70. *See id.*

sentences.[71] The Task Force created a new category of juvenile disposition, designed to give juveniles "one last chance" within the juvenile system.[72] This new juvenile disposition – called Extended Jurisdiction Juvenile Prosecution ("EJJP") – provided for both the imposition of an adult sentence and a juvenile disposition allowing a juvenile to retain the benefits of the juvenile system, but also providing the State with adequate sanctions if the juvenile did not reform his or her delinquent behavior.[73]

The Task Force believed EJJP was unique in its approach to juveniles. At the time, most blending sentencing statutes[74] did not provide adequate procedural safeguards to juveniles or were not blend sentencing models at all. Instead, the statutes were merely different forms of waiver statutes.[75] The EJJP model, on the other hand, guaranteed juveniles all of the adult criminal procedure safeguards, but continued to treat them as juveniles.[76] Under the Task Force's reasoning, if the youth is given the same protections of an adult, then the juvenile court could impose both an adult and juvenile sentence.[77] The Minnesota Legislature adopted the Task Force's recommendation in 1995.[78]

B. Extended Jurisdiction Prosecution Act

In 1995, the Montana Legislature passed its first version of the Extended Jurisdiction Prosecution Act.[79] This Act was modeled after the Minnesota statute.[80] The EJPA is a mechanism which allows a Youth Court judge to retain jurisdiction over a minor who is alleged to have committed an offense that would be a felony if committed by an adult, and at disposition, impose both a juvenile disposition and an adult

71. *See* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 956, 1038 (1995).

72. *See id.*

73. *See id.* at 1038.

74. *See, e.g.*, TEX. FAM. CODE ANN. § 53.045, 54.04, 54.11 (West 1986 & Supp. 1995) and CAL. WELF. & INST. CODE § 1731.5 (West 1992).

75. *See* Feld, *supra* note 71 at 1039.

76. *See id.* at 1040.

77. *See id.* at 1041-42.

78. The Minnesota Legislature enacted the Task Force's recommendation as MINN. STAT. § 260.126 (1995).

79. *See* MONT. CODE ANN. §§ 41-5-1101 thru -1107 (1995) (renumbered §§ 41-5-1601 thru -1607).

80. *See* H. 380, 54th Leg., Reg. Sess. (Mont. 1995) (statement by sponsor Jeanette McKee, representative).

sentence.[81] The adult sentence is stayed upon the condition that the youth complies with the court's order and does not re-offend.[82]

The court must designate the juvenile's case an Extended Juvenile Jurisdiction Prosecution [hereinafter "EJJP"] to treat a juvenile under the EJPA and not under traditional mechanisms. EJJP designation occurs in three ways.[83] First, if the juvenile is at least 14 years of age, the county attorney may request an EJJP designation hearing, and at the hearing, the court may designate the case as an EJJP.[84] For the court to designate a case an EJJP, the judge must find, by clear and convincing evidence, that an EJJP designation would best serve public safety.[85] The second way a case may be designated an EJJP is when the juvenile is alleged to have committed either a "transferable felony,"[86] an offense that would be a felony if committed by an adult, or the juvenile allegedly used a firearm, and the State designates the case an EJJP in the delinquency petition.[87] Lastly, a case may be designated an EJJP, if during a motion to transfer the case to adult court, the judge decides that

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81. *See* MONT. CODE ANN. § 41-5-1604 (1999).

82. *See* MONT. CODE ANN. § 41-5-1604(1)(a)(ii) (1999).

83. *See* MONT. CODE ANN. § 41-5-1602 (1999).

84. *See* MONT. CODE ANN. § 41-5-1602(1)(a) (1999).

85. *See* MONT. CODE ANN. § 41-5-1603(3) (1999); The factors that are considered in determining public safety are: the seriousness of the offense; the culpability of the youth, including the level of planning while carrying out the offense; the youth's prior record of delinquency; the youth's past willingness to undergo treatment; the adequacy of available disposition within the juvenile justice system. *See* MONT. CODE ANN. § 41-5-1606(1) (1999).

86. *See* MONT. CODE ANN. § 41-5-1602(1)(b)(i) (1999). The offenses that are eligible for EJJP are the same offenses listed in the juvenile waiver statute MONT. CODE ANN. § 41-5-206(1). *See* MONT. CODE ANN. § 41-5-1602(1)(b)(i) (1999). A complete list of offenses which may be subject to EJJP designation are: Mitigated Deliberate Homicide, Assault on a Peace Officer or Judicial Officer, Attempted Mitigated Deliberate Homicide, Negligent Homicide, Arson, Aggravated Assault, Assault with a Weapon, Robbery, Burglary or Aggravated Burglary, Possession of Explosives, Criminal Distribution of Dangerous Drugs, Criminal Production or Manufacture of Dangerous Drugs, Use of Threat to Coerce Criminal Street Gang Membership or Use of Violence to Coerce Criminal Street Gang Membership, Escape, attempt, as defined in MONT. CODE ANN. §45-4-103, or accountability, as provided in MONT. CODE ANN. §45-2-301 or any offense enumerated in MONT. CODE ANN. §45-5-206 (1)(b), not including Assault with a Weapon or Escape.

Under the 1999 Extended Jurisdiction Prosecution Act, any offense that is punishable by death or life imprisonment or when a sentence of 100 years may be imposed may no longer be designated an EJJP. This Amendment removes the more serious offenses which are likely to be transferred to District Court under most circumstances. *See* MONT. CODE ANN. § 41-5-1602 (1999).

87. *See* MONT. CODE ANN. § 41-5-1602(1)(b) (1999).

retaining Youth Court jurisdiction would best serve public safety.[88] Once designated an EJJP, the youth court retains jurisdiction of the youth to enforce the disposition of the case.[89]

Upon adjudication, the youth court imposes both a juvenile disposition and an adult sentence.[90] The adult sentence is stayed upon the condition that the youth does not violate the provisions of the juvenile disposition order or commit a new offense.[91] If the juvenile does violate the conditions of his or her dispositional order or commits a new offense, the youth is taken into custody and a hearing is held on a allegations of the violation.[92] If the judge finds by a preponderance of the evidence that the violation or new offense did occur, the judge may impose the adult sentence.[93]

The juvenile receives procedural due process protections both before the case is designated an EJJP[94] and upon alleged violation of the juvenile disposition.[95] For example, during a revocation hearing of an EJJP, the youth is entitled to adequate notice, the right to present witnesses of his behalf, the right to cross-examine witness, and the assistance of counsel.[96] Notwithstanding these procedural due process protections, in 1997, several juveniles challenged the EJPA on constitutional grounds.[97]

IV. IN THE MATTER OF S.L.M.

In *In the Matter of S.L.M.*,[98] the Montana Supreme Court consolidated five cases on appeal to determine the constitutionality of the EJPA statute.[99] In each incidence, the juvenile was designated an Extended Jurisdiction Juvenile

88. *See* MONT. CODE ANN. § 41-5-1602(1)(c) (1999).

89. *See* MONT. CODE ANN. § 41-5-1602(2) (1999). If the case is designated an EJJP, the youth is not transferred to District Court and the Youth Court retains jurisdiction.

90. *See* MONT. CODE ANN. § 41-5-1604 (1999).

91. *See* MONT. CODE ANN. § 41-5-1604(1)(a)(ii) (1999).

92. *See* MONT. CODE ANN. § 41-5-1605 (1999).

93. *See* MONT. CODE ANN. § 41-5-1605(2)(b) (1999). However, the judge does not have to impose the adult sentence; the judge may also continue the stay and place the youth on probation or impose a different disposition under the Code.

94. *See* MONT. CODE ANN. §§ 41-5-1603, 1607 (1999).

95. *See* MONT. CODE ANN. §§ 41-5-1605, 1607 (1999).

96. *See* MONT. CODE ANN. § 41-5-1605(2) (1999).

97. *See In re* S.L.M., 287 Mont. 23, 26, 951 P.2d 1365, 1367 (1997).

98. 287 Mont. 23, 951 P.2d 1365 (1997).

99. *See* S.L.M., 287 Mont. at 26, 951 P.2d at 1367.

Prosecution.[100] All the juveniles received similar dispositional orders and sentences.[101] For example, Strider Moore was arrested for selling $150.00 worth of marijuana to an undercover police officer.[102] The court committed Moore to the Department of Corrections as a delinquent youth until the age of nineteen.[103] The court also entered, but stayed, a sentence of ten years for the charge of criminal sale of dangerous drugs.[104]

All five youths challenged the EJPA as an unconstitutional violation of Equal Protection, the Right of Minors, Due Process, and the Double Jeopardy Clause of the Montana Constitution.[105] On appeal, the Montana Supreme Court determined that the EJPA violated the Equal Protection Clause and the Right of Minors Clause of the Montana Constitution, refusing to address either the alleged Double Jeopardy[106] or Due Process[107] violations.

In *S.L.M.*, the Montana Supreme Court analyzed the EJPA under the Equal Protection Clause and the Right of Minors Clause of the Montana Constitution.[108] The Court concluded that for the EJPA to be constitutional, the State was required to show two things: there was a compelling state interest to

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100. *See id.*

101. *See id.*

102. *See id.*

103. *See In re* S.L.M., 287 Mont. 23, 26-27, 951 P.2d 1365, 1367 (1997).

104. *See* S.L.M., 287 Mont. at 27, 951 P.2d at 1367.

105. *See* S.L.M., 287 Mont. at 26, 951 P.2d at 1367.

106. *See*, S.L.M., 287 Mont. at 40-42, 951 P.2d at 1376-77 (Trieweiler, J., specially concurring) (arguing that EJPA should have been ruled unconstitutional on double jeopardy grounds because it imposed multiple punishments for the same offense). Justice Trieweiler reached this conclusion using the reasons expressed in the dissenting opinion by Justice Leaphart in *State v. Zabawa*, 279 Mont. 307, 311, 928 P.2d 151, 154 (1996). *See id.*

However, § 41-5-1604 provides that a juvenile receives "*a single judgment* consisting of" a juvenile disposition and an adult sentence. MONT. CODE ANN. § 41-5-1604(1)(a) (1999) (emphasis added). Under EJPA, juveniles receive a single disposition consisting of two halves. The disposition may not exceed the amount of time an adult would have received if convicted of the same offense. This type of disposition does not constitute multiple punishments for a single offense, but instead, a single punishment consisting of several parts. It is the author's opinion that under the 1999 Amendments EJPA does not violate the Double Jeopardy provisions of either the United States or Montana Constitution.

107. Although the Court refused to address the alleged Due Process violations, in dictum the Court seemed to indicate that the 1997 Amendments to the EJPA statute cured any past deficiencies stating "the 1997 legislature amended the EJPA to provide for more procedural due process in revocation of stay proceedings. . . . If the State were to initiate revocation of stay proceedings against any of the appellants, the 1997 amendments would insure their benefit." S.L.M., 287 Mont. 23, 29, 951 P.2d 1365, 1369; *See also* MONT. CODE ANN. § 41-5-1605 (2) (1999).

108. *See In re* S.L.M., 287 Mont. 23, 32-39, 951 P.2d 1365, 1370-75 (1997).

designate juveniles under the EJPA, and the EJPA was designed to enhance the protection of minors.[109] The state failed to establish either.[110]

Ruling the Extended Jurisdiction Prosecution Act unconstitutional on two grounds, Equal Protection and the Rights of Minors, the Montana Supreme Court articulated its view that the EJPA treated juveniles who were designated EJJP harsher than their adult counterparts.[111] In situations where an adult and a juvenile were charged with similar crimes, an adult would receive an adult sentence and a juvenile would receive a juvenile disposition. A juvenile designated an EJJP, on the other hand, receives both the juvenile disposition and an adult sentence.[112]

According to the Montana Supreme Court, when a juvenile under the EJPA receives a juvenile disposition in addition to an adult sentence, the juvenile was subjected to a potentially longer sentence than what an adult convicted of a similar offense would receive.[113] The Court felt this framework violated equal protection on its face.[114] Additionally, the statute clearly did not enhance a minor's protection within the juvenile system, but instead, reduced the protection available to a minor.[115]

V. THE 1999 AMENDMENTS TO THE EXTENDED JURISDICTION PROSECUTION ACT

In response to *S.L.M.*, the Montana Legislature revised the Youth Court Act in 1999.[116] The 1999 revisions substantially amended the EJPA.[117] The amendments fall into one of three major categories: revision of Montana's Youth Court Act Declaration of Purpose, removal of certain offenses from EJPA classification, and changes in the maximum amount of time

109. *See* S.L.M., 287 Mont. at 35, 951 P.2d at 1373.
110. *See* S.L.M., 287 Mont. at 39, 951 P.2d at 1375.
111. *See* S.L.M., 287 Mont. at 36, 951 P.2d at 1373.
112. *See* MONT. CODE ANN. § 41-5-1604(1)(a) (1999).
113. *See In re* S.L.M., 287 Mont. 23, 39, 951 P.2d 1365, 1375 (1997).
114. *See id.* at 36, 951 P.2d 1373.
115. *See id.* at 39, 951 P.2d 1375.
116. *See* S. 243, 56th Reg. Sess. (Mont. 1999).
117. *See* S. 243, 56th Reg. Sess. (Mont. 1999) ("An act . . . revising the Extended Jurisdiction Prosecution Act; providing that the act does not apply to certain offenses; providing that the combined time of sentence under an Extended Jurisdiction Prosecution may not exceed the time of imprisonment that an adult could receive under an adult prosecution; . . . clarifying that a sentence under the Extended Jurisdiction Prosecution Act is a single sentence . . . .").

available for imprisonment under the EJPA.[118]

The first major category, the amendments to the Montana Youth Court Act's Declaration of Purpose, changed the focus of the EJPA.[119] The amended Declaration of Purpose states, "[the Montana Youth Court Act must be interpreted] to prevent and reduce youth delinquency through *a system that does not seek retribution but that provides*: immediate, consistent, enforceable, and avoidable consequences of youths' actions; [and] a program of supervision, care, rehabilitation, . . . and community protection for [the youths] *before they become adult offenders* . . . ."[120] This amendment addressed the Court's concern in *S.L.M.* that the EJPA went beyond mere rehabilitation and injected a "specter of retribution" into the juvenile justice system.[121] The Legislature never intended for the Youth Court Act to be interpreted as using retribution as the primary means of managing youthful offenders.[122] The concept of EJPA was to provide Youth Court Judges with stronger sanctions to impose against juveniles, yet still allow the juvenile justice system to work its "rehabilitative magic;" and not to provide judges with a mechanism to "lock-up" juveniles for an extended period of time.

In amending the stated purpose of the Youth Court Act, the Montana Legislature articulated its view that the expressed reason for Montana's youth court system is to consistently provide juveniles with a program of meaningful, yet serious consequences arising from a youth's anti-social behavior.[123] In amending the EJPA, the Montana Legislature has reaffirmed its belief that extended juvenile jurisdiction is an effective way to provide rehabilitation and treatment.[124] The enactment of the EJPA was not meant to impose retribution into the juvenile

118. *See generally id.*

119. *See* MONT. CODE ANN. § 41-5-102 (1999).

120. MONT. CODE ANN. § 41-5-102(2)(a)&(b) (1999) (emphasis added).

121. *See In re* S.L.M., 287 Mont. 23, 36, 951 P.2d 1365, 1373 (1997).

122. *See EJPA Revision Hearing on S. 243 Before the Senate Comm. on Judiciary*, 56th Reg. Sess. (Mont. 1999) [hereinafter *EJPA Revision Hearing*] (statement by Senator Fred Thomas, sponsor) ("[The EJPA and] the longer sentence is to encourage the youth to perform the judgment and end up with only a juvenile record.").

123. *See* MONT. CODE ANN. § 41-5-102(2) (1999).

124. *See* S. 243, 56th Reg. Sess. (Mont. 1999) ("WHEREAS, extending juvenile jurisdiction with the possibility of an adult sanction for failure to comply with conditions of a stayed sentence or for additional criminal behavior by the youth has been shown to be an effective incentive in other states to rehabilitate juveniles to keep them out of the adult correctional system and allow them to pay restitution, finish treatment, and complete their education . . . ."). *See id.* at Preamble.

justice system, but merely to provide incentives for juveniles to reform.[125]

The second major category of change in the 1999 version of EJPA was the removal of certain offenses, which were previously available for EJJP designation.[126] In an effort to reaffirm rehabilitation as the goal of the EJPA, the 1999 Legislature removed certain serious offenses from eligibility.[127] The Montana Legislature realized some juveniles were not candidates for meaningful rehabilitation and therefore not candidates for EJJP designation. Offenses punishable by death, life imprisonment, or a sentence of 100 years were no longer eligible for EJJP designation.[128] This Amendment removes offenses like deliberate homicide,[129] sexual intercourse without consent,[130] and aggravated kidnapping[131] from EJPA eligibility.[132] If the genuine purpose behind the EJPA is to focus on rehabilitation, and not retribution, then limiting the EJPA to a narrow group of felonies reinforces that objective.

Offenses that are still available for EJPA designation after the 1999 revisions are typically the serious property offenses. Normally, these offenses warrant substantial and severe consequences, but do not warrant total removal from the juvenile system. By removing the serious and violent offenses like deliberate homicide, EJPA focuses its objective on rehabilitation and not on offenses where rehabilitation is unlikely to occur.[133] The 1999 version of the EJPA focuses on

125. *See EJPA Revision Hearing*, *supra* note 122. In a statement by Missoula County District Judge John Larson, a proponent of the 1999 EJPA revisions he stated, "[The EJPA] gives the juvenile an extra chance. It also gives the judge and the probation officers and extra lever to encourage the juveniles to perform that judgment." *Id.* He went on to state, "[t]he key to the juvenile system *has always* been to fashion more individual solutions for the young people." *Id.*

126. *See* S. 243, 56th Reg. Sess. (Mont. 1999).

127. *See* S. 243, 56th Reg. Sess. (Mont. 1999). Section 41-5-1602 was amended to read that the EJJP designation applies to all offenses if the offense would be a felony if committed by an adult "except an offense punishable by death or life imprisonment or when a sentence of 100 years could be imposed . . . ." *Id.*

128. *See* MONT. CODE ANN. § 41-5-1602(1)(b)(i) (1999).

129. *See* MONT. CODE ANN. § 45-5-102 (1999).

130. *See* MONT. CODE ANN. § 45-5-503 (1999).

131. *See* MONT. CODE ANN. § 45-5-303 (1999).

132. A complete list of offenses which may no longer receive the benefit of EJJP are: deliberate homicide, aggravated kidnapping, sexual assault, sexual intercourse without consent, incest and sexual abuse of children.

133. *But see* Stevens H. Clarke, *Increasing Imprisonment to Prevent Violent Crime: Is It Working?*, POPULAR GOVERNMENT, Summer 1994 at 16-24. (arguing that the seriousness of the offense is a poor predictor of recidivism); *see also* Eric Lotke & Vincent

those juveniles who are accused of serious offenses where a traditional juvenile dispositions will provide meaningful rehabilitation, likely to reduce recidivism, but where a more severe sanction needs to be a possibility. The removal of certain offenses from the EJPA furthers the expressed rehabilitative purposes of the Youth Court Act.

The final amendment the 1999 Legislature made was to limit the maximum period of imprisonment available under the EJPA. The Montana Legislature addressed two separate concerns of the Montana Supreme Court by this amendment. First, that the EJPA is not a "secret weapon" used by prosecutors and judges to impose longer sentences than would be available under traditional adult or juvenile sentences. Second, to specifically address the Court's concern that, conceivably, a juvenile's total sentence under the EJPA could be longer than an adult would receive if convicted of the same offense.[134]

Section 41-5-1604, MCA, addresses this specific deficiency. This section states that "the combined period of time [of] a juvenile disposition . . . plus an adult sentence . . . may not exceed the maximum period of imprisonment that could be imposed on an adult convicted of [a similar] offense . . .."[135] The addition of this language negates the Court's fear of a juvenile under EJPA receiving a sentence that could exceed a similar adult sentence. Through this addition, the legislature intended to erase any Equal Protection violations the Montana Supreme Court found in the former version of the EJPA.[136]

The purpose of the EJPA is to give the youth court judge ample discretion when imposing an EJJP disposition. Although the youth court judge must impose both an adult sentence and a juvenile disposition, the judge is free to adjust the sentence in accordance with the circumstances of the crime. The combined period of time may not exceed the maximum an adult would

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Schiraldi, *An Analysis of Juvenile Homicides: Where They Occur and the Effectiveness of Adult Court Intervention*, NATIONAL CENTER OF INSTITUTIONS AND ALTERNATIVES (visited on July 17, 2000) <http://www.ncianet.org/ncia/ waiver.html> (arguing that no correlation exists between high transfer rates and low juvenile homicide rates, concluding that transfer statutes do not deter serious and violent juvenile crime.).

134. *See In re* S.L.M., 287 Mont. 23, 39, 951 P.2d 1367, 1375 (1997).

135. MONT. CODE ANN. § 41-5-1604(1)(b) (1999).

136. *See* S. 243, 56th Reg. Sess. (Mont. 1999) ("WHEREAS, the maximum extension or period of jurisdiction may not exceed the period of an adult sentence without violating equal protection."). *Id.* at Preamble.

receive if convicted of a similar offense.[137] This nullifies any fear that juveniles are being treated more harshly than their adult counterparts. Even if the court finds that the conditions of the juvenile disposition were violated, the judge is not required to impose the stayed adult sentence.[138] Instead, the judge may continue the current sentence, impose a new juvenile disposition, or revoke the disposition and impose the adult sentence.[139]

It is important to note that the recent revisions to EJPA were not a knee-jerk reaction to the decision of *S.L.M.* The amendments to the EJPA attempted to intelligently deal with the constitutional deficiencies the Montana Supreme Court found in the EJPA. The Montana Legislature clearly expressed its desire to continue with blended sentencing in Montana, believing the EJPA is a meaningful and thoughtful way to handle certain juveniles accused of enumerated offenses. Blended sentencing is a valid and acceptable alternative to traditional methods of sentencing that attempts to address the problem of juvenile crime. The EJPA provides judges with a mechanism to handle juveniles that are receptive to rehabilitation, but are in need of an extra incentive not to re-offend.

The 1999 version of EJPA is Montana's democratic answer to the "youthful offender." According to the Montana Legislature, the staying of an adult sentence has been an effective incentive in other states to prevent recidivism while providing rehabilitation to juveniles that keeps them out of the adult correctional system.[140] The Legislature believes this type of blended sentencing will provide the appropriate level of accountability while still according the needed rehabilitation to certain juveniles without violating a minor's constitutional rights.[141]

In order for the EJPA, as amended in 1999, to be

137. *See* MONT. CODE ANN. § 41-5-1604(1)(b) (1999).

138. *See* MONT. CODE ANN. § 41-5-1605(2)(b)(i) (1999).

139. *See* MONT. CODE ANN. § 41-5-1605(b) (1999).

140. *See EJPA Revision Hearing*, *supra* note 122. According to by John Larson, Missoula County District Court Judge: "The data [from Minnesota] shows that this [type of blended sentencing] is filling the gap between juveniles who commit serious offenses and are transferred into the adult system and juveniles who are not." Judge Larson went on to state: "[t]he data from Minnesota shows that this is working and very few of the sentences are actually revoked and go into the adult system." *Id.*

141. *See EJPA Revision Hearing*, *supra* note 122 (statement by Senator Halligan: "Since the youth court provides better services, [EJPA] is worth looking [into].").

constitutional it must survive a strict scrutiny equal protection analysis, as well as a Rights of Minors analysis under the Montana Constitution. The constitutionality of the "new" EJPA has not yet been addressed by the Montana Supreme Court. However, as shown in Part VI and V, the 1999 version of the EJPA will survive any constitutional attack.

VI. EQUAL PROTECTION

Under the EJPA, the judge is required to impose both an adult sentence and a juvenile deposition.[142] According to the Montana Supreme Court, imposing both a criminal sentence and a juvenile disposition is an infringement of a juvenile's physical liberty, a fundamental right under the Montana Constitution.[143] To satisfy this burden, the state was required to show a narrowly tailored compelling state interest, with no other less burdensome alternatives available to accomplish the same objectives.[144] In *S.L.M.*, the state failed to meet this burden.[145]

In *S.L.M.*, the Montana Supreme Court rejected the argument that the Youth Court Act was solely for rehabilitational goals.[146] The 1997 Youth Court Act, according to the Court, was no longer "strictly for rehabilitation." The purpose and goals of the 1997 Youth Court Act focused more on community protection and deterrence of juvenile crime instead of rehabilitation.[147]

The Court stated that the EJPA could not rely on the doctrine of *parens patriae*[148] to treat juveniles differently than adults.[149] The traditional doctrine of *parens patriae* applies to the paternalistic rational of the State to act as the guardian of the juvenile, as juveniles cannot take care of themselves.[150] The

142. *See* MONT. CODE ANN. § 41-5-1604 (1999).

143. The Court applied a strict scrutiny analysis to the Equal Protection violation because the infringement involved a fundamental right. *See In re* S.L.M., 287 Mont. 23, 34, 951 P.2d 1365, 1372 (1997). A juvenile's physical liberty is a fundamental right. *See In re* C.H., 210 Mont. 184, 201, 683 P.2d 931, 940 (1984).

144. *See In re* Wood, 236 Mont. 118, 124, 768 P2d 1370, 1374 (1989) (citing Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972)).

145. *See* S.L.M., 287 Mont. at 39, 951 P.2d at 1375.

146. *See id.*

147. *See id.*

148. Parens patriae is the "principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." *See* BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

149. *See In re* S.L.M., 287 Mont. at 39, 951 P.2d at 1375 (1997).

150. *See In re* C.S., 210 Mont. 144, 146, 687 P.2d 57, 59 (1984).

original purpose of the juvenile justice system was to provide a forum where the State could act as *parens patriae*.[151] Yet under the EJPA, the juvenile is not treated solely as a juvenile and the paternalistic rationale does not apply.[152] The doctrine of *parens patriae* is not a justification for treating juveniles more harshly than adults.[153]

The EJPA requires a strict scrutiny analysis because it infringes upon a fundamental right. Absent a compelling state interest, the statute violates equal protection. The compelling interest must be narrowly tailored with no less burdensome alternative available which accomplishes the same objectives.[154] The statute must pass this test to be constitutional.[155] According to the Montana Supreme Court in *S.L.M.*, the previous version of the EJPA did not meet this burden. Under the 1999 amendments, however, the EJPA passes a strict scrutiny analysis. The state has several compelling state interests in using the EJPA. Furthermore, the statute is narrowly tailored and no other alternatives can accomplish the goals of the EJPA.

A. Compelling State Interest

The infringement of a juvenile's physical liberty is justified under the EJPA for a number of reasons. First, juveniles require supervision and rehabilitation, second, treatment within the juvenile system exists to an extent not available within the adult system, and lastly, keeping delinquent minors within the juvenile system reduces recidivism.

The Montana Supreme Court has stated in earlier cases that a juvenile's right to physical liberty is not absolute and

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151. *See id.*

152. *See* S.L.M., 287 Mont. at 39, 951 P.2d at 1375.

153. *See In re* S.L.M., 287 Mont. 23, 39, 951 P.2d 1365, 1375 (1997); *see also In re* C.S., 210 Mont. at 145-46, 687 P.2d at 58-60. In 1984, the Montana Supreme Court found that juveniles could be treated differently than adults within the juvenile justice system because the two groups were not similarly situated. Based on the doctrine of *parens patriae* and the separate goals of the juvenile system and the adult system, a juvenile receiving a harsher sentence than an adult could receive charged with the same offense was not a violation of Equal Protection. *See* C.S. at 146-47, 687 P.2d at 58-59.

154. *See In re* Wood, 236 Mont. 118, 124, 768 P.2d 1370, 1374 (Mont. 1989) (holding that when a law infringes on a fundamental right, the Court must apply a strict scrutiny analysis). A strict scrutiny analysis requires the Government to prove that the statute was justified by a compelling state interest, which is narrowly tailored and no "other avenues less burdensome are available in which to accomplish the objective." *Id.*

155. *See* Wood, 236 Mont. at 124, 768 P.2d at 1374.

must be balanced against his or her need to be supervised.[156] Strong state interests exist in treating juveniles outside the criminal system and keeping them within the juvenile justice system. Accordingly, a juvenile's physical liberty may be restricted and defined by state legislation.[157]

As stated earlier, the EJPA seeks to provide rehabilitation in the juvenile system, not retribution.[158] The goal behind rehabilitation is prevention. Deterring juveniles from becoming adult offenders has always been a legitimate state interest.[159]

In 1984, *In the Matter of C.H.*,[160] the Montana Supreme Court held that treating minors differently than adults did not violate Equal Protection, even though treating them differently than adults infringed on the juvenile's physical liberty.[161] In *C.H.*, the state demonstrated two legitimate, compelling state interests:[162] first, "to rehabilitate youthful offenders by providing for their care, protection and wholesome mental development before they become adult criminals;"[163] second, "to substitute a program of supervision, care and rehabilitation and remove the element of retribution for a youth who has violated the law."[164]

The majority in *S.L.M.* found these compelling interests invalid reasons to infringe upon the physical liberty of juveniles.[165] The compelling reasons set forth in *C.H.* were no longer valid under the 1995 Youth Court Act due to the "specter of retribution" that the EJPA injected into the juvenile system.[166] Because of the 1995 amended Declaration of Purpose, the Youth Court Act focus had changed:[167] the goal under the

156. *See In re* C.H. 210 Mont. 184, 203, 683 P.2d 931, 941 (1984).

157. *See* Wood, 236 Mont. at 123, 768 P.2d 1374 (citing Woodard v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977) *cert. denied*, 434 U.S. 1088 (1978) (explaining that juveniles do not have an inherent right to be treated within the juvenile system and state legislation may restrict and redefine treatment "so long as not arbitrary or discriminatory classification is involved.")). Wood, at 122, 786 P.2d at 1373.

158. *See* Mont. Code. Ann. § 41-5-102(2) (1999).

159. *See* C.H., 210 Mont. at 203, 683 P.2d at 941 (holding that "a juvenile's right to physical liberty must be balanced against her right to be supervised, cared for and rehabilitated" and is sufficient to warrant an infringement upon the fundamental right of physical liberty).

160. 210 Mont. 184, 683 P.2d 931 (1984).

161. *See In re* C.H., 210 Mont. at 203, 683 P.2d at 941 (1984).

162. *See id.*

163. *Id.*

164. *In re* C.H., 210 Mont. at 201, 683 P.2d at 941.

165. *See In re* S.L.M., 287 Mont. 23, 36, 951 P.2d 1365, 1373 (1997).

166. *See id.*

167. *See id.*

Youth Court Act was no longer rehabilitation, but retribution. The "specter of retribution" in the 1995 Youth Court Act distinguished *C.H.* from *S.L.M.*[168] Under the 1995 Amendment, the Act was "much more preventive, if not punitive"[169] in nature, instead of the rehabilitative goals of the pre-1995 Youth Court Act.

The Court in *S.L.M.* concluded that rehabilitation was no longer the main focus of the Youth Court Act.[170] But as the recent amendments demonstrate, rehabilitation is the purpose of the Act, and not retribution.[171] EJPA provides the state with the means to accomplish this objective by encouraging prosecutors and Youth Court judges to address delinquency within the juvenile system while the youth is still receptive to treatment.[172]

The purpose of Montana's Youth Court Act has returned to rehabilitation. Juveniles may once again receive the treatment and guardianship needed, thereby reducing the chances of them becoming adult criminals. The element of retribution has been removed and replaced with "a program of supervision, care, [and] rehabilitation."[173] The compelling state interests under the *C.H.* analysis are once again valid under the 1999 Youth Court Act.

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168. *See id.*

169. *Id.*

170. *See* discussion *supra* Part IV.

171. *See* MONT. CODE ANN. § 41-5-102 (1999); *See also* discussion *supra* Part V.

172. Many experts believe that most juveniles are receptive to rehabilitation and most causes of juvenile delinquency are reversible. *See* Klien, *supra* note 49 at 406; *See also* Laureen D'Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is not a Panacea*, 2 ROGER WILLIAMS U. L. REV. 277, 285 (1997) (arguing that although serious violent crime peaks between the ages of sixteen and seventeen, it dramatically decreases after the age of twenty, "[t]herefore, offenses at a young age do not indicate future criminality, but rather suggest that rehabilitation can be effective . . . ."); *See also* SHAY BILCHIK, U.S. DEP'T JUSTICE, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES: 1994-1996 5 (1997). Bilchik argues that juvenile transfer should be used sparingly and with caution. Bilchick cites the National Council of Juvenile and Family Court Judges for the proposition that:

> "Juvenile delinquency jurisdiction should be to age 18 in every state. In most cases, juvenile offenders can be effectively maintained in the juvenile justice system. In rare instances, the most violent offenders cannot be rehabilitated within the juvenile system and should be transferred for adult prosecution. However, the decision to transfer should be only be made by the juvenile or family court judge."

Id. (quoting *Violent Juvenile Offenders: Police Perspectives*, CAMPAIGN FOR AN EFFECTIVE CRIME POLICY: PUBLIC POLICY REPORTS: A SERIES OF REPORTS ON MAJOR ISSUES IN CRIMINAL JUSTICE, July 1996 at 1, 7.).

173. MONT. CODE ANN. § 41-5-102(b) (1999).

The increased availability of treatment programs within the juvenile justice system is another compelling state interest in the designation of minors under the EJPA. Juvenile system opportunities, such as treatment, education, and counseling are simply not available for adult offenders. Juveniles routinely receive counseling and group therapy for personality or social disorders, and education is usually mandatory.[174] The opposite is true in the adult system. In the adult system, therapy and education is not always available, or even sufficient.[175] As such, the state has a strong compelling interest in keeping as many youths within the juvenile system as long as possible.

The mechanism where the State can transfer a juvenile from youth court to district court under certain circumstances – transfer statutes[176] – provides another reason why there needs to be an intermediary between youth court and adult court. As discussed supra, Montana has the ability to transfer certain youths to district court,[177] removing any possibility for the juvenile receiving treatment within the juvenile system. Juveniles who are transferred are treated as adults. Using the transfer statute is not always an appropriate answer to delinquency.

The goal of the EJPA is to keep juveniles within the juvenile system while providing adequate sanctions for the delinquent behavior. Most of the juveniles who will be subject to EJJP designation are the same juveniles who could be transferred to adult court. In fact, one way for a juvenile to be designated EJJP is when the judge determines, during a transfer hearing, that public safety is best served by keeping the juvenile in the juvenile system. Without a blended sentencing alternative available, the state will be forced to transfer the youth to adult court. By doing this, the possibility of treatment is forever removed from the youth. This also dramatically increases the likelihood that the youth will reoffend.[178] As discussed previously, scholars argue that transfer to criminal court actually aggravates short-term recidivism.[179] Without the EJPA, the youth would not have the opportunity to reform, instead he or she will be treated as an adult, in adult court,

174. *See* Klien, *supra* note 49 at 403.
175. *See* D'Ambra, *supra* note 172 at 296.
176. *See* discussion *supra* Part II.B.
177. *See* MONT. CODE ANN. § 41-5-206 (1999).
178. *See* Bishop *supra* note 48, at 183-84; *see also* Fagan *supra* note 53, at 408-09.
179. *See id.*

receiving adult time, becoming adult criminals.

Concerns other than punishment (i.e. rehabilitation, mental development of the youth, etc.) are addressed when the court determines the proper sentence for a delinquent youth. Some juveniles will be accused of offenses that are both "transferable" and within the EJPA. When this occurs, the EJPA allows for a program where the state can impose traditional juvenile sanctions, but also impose a condition to insure compliance from the youth.[180] Without this available "middle ground," the state will be left with no choice except to transfer jurisdiction to district court. Under this scenario, if a youth is transferred, juvenile focused treatment is no longer an option. If the goal is to lower recidivism, not allowing a form of blended sentencing will preclude a state from achieving that goal.

As the Court stated in *In the Matter of C.H.*, the constitutional authority for treating juveniles differently than adults is the juvenile's need to receive rehabilitation, care, protection, and mental development to reduce the chance of them becoming adult offenders.[181] These reasons are sufficient state interests to treat juveniles differently under the EJPA and not under traditional juvenile dispositions.

B. Narrowly Tailored

Strict scrutiny analysis requires the statute to be narrowly tailored in accomplishing its objective. The revised EJPA is narrowly tailored in the type of youths eligible for EJJP designation. For a youth to be designated an EJJP case, the youth must be accused of a narrow group of enumerated offenses,[182] satisfying certain criteria, with the county attorney requesting an EJJP designation. Because of such a narrow focus, the EJPA will not be frequently used. The EJPA will only be invoked with juveniles who have been accused of serious offenses and are believed to have a chance of re-offending, but are still receptive to rehabilitation.

The EJPA statute is narrowly tailored, designed to achieve rehabilitation in the youth and limited only on those youths who are most susceptible to treatment. EJPA does only what is necessary to achieve its desired goal: rehabilitation of the youth combined with incentives to ensure compliance.

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180. *See* MONT. CODE ANN. § 41-5-1604 (1999).

181. *See In re* C.H., 210 Mont. 184, 203-04, 683 P.2d 931, 941 (1984).

182. For a complete list of EJPA eligible offenses see *supra* note 86.

C. No Less Burdensome Alternative Available

It may be true that there are less burdensome alternatives within the juvenile system to handle the average juvenile offender. For most juvenile offenders, the EJPA is not the best alternative. However, the EJPA is not designed for average juveniles. The EJPA focuses on a select few who have committed serious offenses. Although an offense may be serious enough to warrant transfer to adult court, the judge believes the delinquency is best addressed through the EJPA.

There are no other less burdensome alternatives that provide the state with the opportunity to treat juveniles within the juvenile system, but still enable judges to provide incentives for the youth to not re-offend.

VII. RIGHT OF MINORS

The Montana Supreme Court held that juveniles who are treated under the EJPA are treated unfairly and more harshly than their adult counterparts.[183] This unfair treatment violated the Right of Minors Clause of the Montana Constitution. In so holding, the Court required the state to show both a compelling state interest and that the EJPA was designed to enhance the protections of minors. The Court may have been in error in requiring both a compelling state interest and the showing that the interest enhanced the protections of minors. However, under the 1999 amendments, it is clear that the state has a legitimate interest in designating juveniles as EJJP cases, and such a designation enhances the status of being a minor.

Under the Montana Constitution, all minors must be afforded the same fundamental rights as adults, unless precluded by laws which enhance their protection.[184] Laws may be passed that limit the fundamental rights of minors if a clear showing is made that the law enhances the youth's protection.[185] When a law infringes on a fundamental right of a minor, the state is required to prove the infringement was designed to

183. *See In re S.L.M.*, 287 Mont. 23, 36, 951 P.2d 1365, 1373 (1997).

184. Article II, Section 15 of the Montana Constitution states: "The Right of Persons not Adults. The rights of persons under 18 years of age shall include, but not limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons."

185. *See Montana Constitutional Convention* 1971-1972, *Committee Proposal No. 8: Bill of Rights Committee, at* 635-36 (1972) [hereinafter COMMITTEE PROPOSAL].

provide added protection to the youth.[186]

Some legal scholars argue that the Right of Minors Clause imposes a four-part infringement test.[187] However, in *S.L.M.*, the Montana Supreme Court interpreted the clause to require a two-prong infringement analysis. The state must show a compelling state interest to justify the infringement, *and* the compelling state interest must afford greater protections to the minor.[188]

This additional requirement actually affords juveniles more rights and protections than adults, contrary to the plain language of the Montana Constitution. The plain language of the Right of Minors provision requires *either* a compelling state interest or that the law enhances the protection of the youth, not both.

The delegates to the 1972 Montana Constitution on the Bill of Rights Committee wanted to insure minors the same fundamental rights of adults, not more.[189] If a law violated a fundamental right of the youth, the law was required to enhance the status of being a youth.[190] Thus, the Montana Supreme Court's interpretation of granting minors enhanced protection to youths appears to be in conflict with the intention of the delegates and the plain language of the Montana Constitution.[191]

Under a traditional analysis of equal protection for adults, if

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186. *See* S.L.M. 287 Mont. at 35, 951 P.2d at 1373.

187. *See generally* Matthew B. Hayhurst, Comment, *Parental Notification of Abortion and Minors' Rights Under the Montana Constitution*, 58 MONT. L. REV. 565, 578-81 (1997) ("[W]hen the right of a minor is contested under the Montana Constitution, the court applies a four-part test: (1) analyze the nature of the minor's right affected by the disputed legislation; (2) determine whether the legislation infringes on that right; (3) if an infringement is found, balance the right that has been invaded against the rights of the minor that are allegedly enhanced by the legislation; and finally (4) determine whether the invasion is justified by a sufficiently compelling state interest.").

188. *See* S.L.M. at 34, 951 P.2d at 1372.

189. *See* COMMITTEE PROPOSAL, *supra* note 185 at 636; *see also* Montana Constitutional Convention Comm'n, *Montana Constitutional Convention Study No. 10: Bill of Rights* 301-05 (1972).

190. *See* COMMITTEE PROPOSAL, *supra* note 185 at 635-36.

191. *See* COMMITTEE PROPOSAL, *supra* note 185 at 636 ("[t]his is the crux of the committee proposal: to recognize that persons under the age of majority have the *same protections* from governmental and majoritarian abuses as do adults.") (emphasis added); *but cf. In re* S.L.M., 287 Mont. at 35, 951 P.2d at 1373 (1997) (the court stating that "if the legislature seeks to carve exceptions to this guarantee, it must not only show a compelling state interest but must also show that the exception is designed to enhance the rights of minors.").

the law infringes upon a fundamental right, and the state can show a compelling state interest that is narrowly tailored, the law does not violate equal protection.[192] Montana minors are guaranteed the same fundamental rights as adults.[193] If a law involving minors is determined not to violate equal protection, the Rights of Minors Clause[194] should not require additional protections merely because the law encompasses minors. Instead, the Clause requires the state to show that the law was designed to enhance the protection of minors, if the state wants to treat minors *differently* than adults. It is logical to assume that if a law is found not to violate equal protection under a traditional analysis, the mere status of being a minor does not provide greater protection under the plain language of the Rights of Minors Clause.

The protection of minors' fundamental rights was the intent of the drafters to the Montana Constitution.[195] The drafter's were not attempting to provide *more* protection to minors, but merely the same protection that adults were given.[196] It was understood, however, that there were some circumstances where the rights of minors had to be limited. That limitation, according to the Montana Constitution, was acceptable if the limitation improved the treatment of minors.[197] In other words, if a law did not violate a fundamental right, the law did not need to enhance the protections of minors, because the minor was still

192. *See* discussion *supra* Part VI.

193. *See supra* note 184.

194. MONT. CONST. art. II, § 15.

195. An examination of the 1972 Montana Constitutional Convention transcripts demonstrates that the delegates wanted to make sure that all of the basic rights afforded to adults would be afforded to persons under the age of majority. Delegate Monroe stated to the committee "[w]hat this section is attempting to do is to help young people to reach their full potential. [W]e do not want them to lose any rights that any other Montana citizen has, and this is specifically what this particular section is attempting to do." 5 MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS 1749-52 (1981).

196. *See id.* at 1752. Delegate Dahood stated: "All we're going to do is make sure that the young boys and the young girls, the young men, the young women, prior to reaching the age of majority, are going to know that during that particular period of maturity they shall have all the basic rights that are accorded to all citizens of the State of Montana, and they are going to be better trained to be more responsible citizens." *Id.*

197. *See id.* at 1751-1752. The provision "except where specifically precluded by laws which enhance the protection for such persons," was inserted because the delegates recognized that minors could not be treated exactly like adults. According to the delegates, there were times where laws would need to be passed which limited the right of minors. One example used by Delegate Monroe – the drinking age of 19 – need to exist because such a law enabled minors to become responsible members of society. *See id.* at 1751.

being afforded the same fundamental rights as an adult.[198] The state must treat minors and adults equal unless treating them differently enhances the protections of being a minor.

According to the Montana Supreme Court, the EJPA was unconstitutional unless the state could show that it enhanced the protection of minors.[199] Applying this analysis to the 1999 Amendments of EJPA, the state is required to demonstrate a legitimate interest that increases the protection of youth beyond what is required in a traditional equal protection analysis.

The 1999 version of the EJPA no longer violates equal protection because of the revision to the EJPA statutes and the sufficient compelling state interests involved. However, under the current Rights of Minors interpretation, that alone is insufficient. The question is whether the EJPA enhances the protections of minors who are designated EJJP and continues to demonstrate a compelling state interest. As discussed previously, the goal of the EJPA is to keep minors within the juvenile system where treatment and rehabilitation can be provided, but also to allow for adequate recourse to ensure the youth does not re-offend. This goal is achieved by reducing recidivism, allowing for treatment, and avoiding the transfer of minors to district court.

The availability of treatment within the juvenile system enhances the minor's rights because they are accorded with programs that will reduce recidivism and decrease the likelihood that they will become adult offenders. Minors under the EJPA are not treated as adults, but instead as juveniles in an environment where their behavior may be modified to conform with societal norms.

Protections of the youth are also enhanced because the EJPA will be used an alternative to the "transfer statute."[200] Some juveniles need more strict consequences then were traditionally available in youth court. The EJPA imposes the necessary consequences of delinquent behavior, but also continues to provide delinquent minors with needed treatment. Without the EJPA as an alternative, the state is forced to transfer certain juveniles to adult court because the availability of adequate sanctions do not exist within the juvenile system.

198. *See id.* at 1751. In one example provided by Delegate Monroe, Article II, Section 15 would not prevent juveniles from receiving procedural due process protections, merely because it is was a minor who was arrested. *See id.*

199. *See In re* S.L.M., 287 Mont. 23, 35, 951 P.2d 1365, 1373 (1997).

200. *See* discussion *supra* Part II.B.

Providing a means of retaining youth court jurisdiction enhances a youth's protection because the youth court can render adequate treatment and rehabilitation, where the adult court cannot. This result clearly enhances the protection of minors.

The EJPA provides the State with alternative methods of addressing delinquent youths. In its purest form, as Montana's statute shows, the EJPA provides troubled juveniles with the ability to stay within the protection of the youth court system, getting all the protections and benefits of that status. Without statutory provisions like the EJPA, the State has no ability to keep a juvenile in the youth court's jurisdiction due to the severity of the offense and age of the offender.

Under the 1999 revisions to the EJPA, juveniles rights are protected to an extent greater than previously available. The ability to remain within the youth court's jurisdiction provides a youth with benefits and protections not available in the adult system. This ability is the core of *enhancing* the protection of juveniles. EJPA clearly shows a compelling state interest that also enhances the right of minors. The 1999 version of EJPA does not violate Article II, Section 15 of the Montana Constitution.

VIII. CONCLUSION

The Montana Legislature has chosen blended sentencing as a beneficial option to combat juvenile delinquency. In 1997, the Montana Supreme Court found that option unconstitutional under the Montana Constitution. The Legislature responded by amending the EJPA. Those amendments cured any previous constitutional deficiencies in the EJPA.

The Court may have been correct in determining that the EJPA violated the constitutional rights of minors prior to the 1999 Amendments. But as it has been shown, those deficiencies have been corrected. The EJPA, as amended in 1999, will survive any constitutional attack. The compelling state interest under an equal protection analysis is the need to encourage juveniles to reform their delinquent behavior. Juveniles need the rehabilitation programs of the juvenile justice system. Rahabilitational programs which decrease the likelihood of future adult criminal behavior are generally unavailable within the adult system.

Similarly, the EJPA enhances the protections of minors by providing a mechanism where delinquent behavior can be

addressed within the juvenile system, avoiding transfer to adult court. The EJPA is likely to reduce recidivism more consistently than any other juvenile disposition option currently available.

In ruling the EJPA unconstitutional, the Court removed a useful tool that provided the state with an alternative of dealing with juveniles who were established delinquents, but not serious enough to warrant their total removal from the juvenile justice system.

Blended sentencing combines both the belief that juveniles need help and should not be treated like adults, and the belief that juveniles who commit more serious, violent offenses, need to face serious sanctions for their behavior. The juvenile "super-predator" may or may not exist in today's world. However, there is no correlation between juveniles who commit serious felonies and juveniles who are amendable to treatment. Because the seriousness of the offense is such a poor predictor of future criminal behavior, juveniles who commit an isolated serious offense may be *more* amendable then juveniles who commit several non-serious felonies.[201] The juvenile system works. All juveniles, even those who commit serious felonies, should be given an opportunity to use it.

Research shows that most juveniles can be rehabilitated.[202] Research also shows recidivism is lower when juveniles are not transferred to adult court.[203] As it has been stated previously, transfer may increase, not decrease the likelihood of a juvenile re-offending. The EJPA is an intermediate or "third system," designed to handle serious, repeat, and violent juvenile offenders. The EJPA offers a "graduated juvenile system" providing the youth with the benefits of the juvenile system where rehabilitation and treatment is still the purpose, but also

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201. *See* Clarke, *supra* note 133 at 20 (explaining that the more serious the current offense is, the less likely the offender will recidivate and if he does, the less serious the subsequent offense will be); *see also* D'Ambra, *supra* note 172 at 299 n.154. The author reports that a 1993 Office of Juvenile Justice and Delinquency Prevention study identifies four indicators of future delinquency: "(1) impoverished upbringing, (2) sub-standard housing and health care, (3) inadequate education, and (4) serious domestic problems ranging from parental absence and neglect to physical and sexual abuse." *See id*; *see also* Delbert Pruitt, *Juvenile Transfer in Capital Cases: Rehabilitation by Execution?*, KY CHILDREN'S RIGHTS J. 1, 3 (Summer 1989) (stating that "as a general rule, past behavior is the best predictor of future behavior. Rather than the seriousness of the crime, the number of contacts that a juvenile has had with the juvenile justice system is a far better predictor of recidivism.").

202. *See* Clarke, *supra* note 133 at 20.

203. *See* Bishop, *supra* note 48 at 183; *see also* Fagan, *supra* note 53 at 408; *see also* Lotke & Schiraldi, *supra* note 133.

with the accountability society views as necessary to address juvenile delinquency.

The Montana Legislature's decision to amend the EJPA clearly shows that it believes blended sentencing is a positive alternative to dealing with delinquent youth. Prior constitutional deficiencies have been removed, allowing the EJPA to be a useful intermediate sentencing choice for youth court judges.

The juvenile system is evolving and Montana is attempting to evolve with it. Preventing delinquency and providing a system where children can learn to change their behavior thereby becoming productive members of society is the goal of the juvenile system. The more delinquent youths we keep in the juvenile system, the less likely we, as a society, are creating an inevitable path of adult criminal behavior. Montana's Extended Jurisdiction Prosecution Act does not provide overzealous prosecutors and judges with a 'bigger stick,' it provides troubled kids a last chance at life.